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SIDAMBARAM TOROSAMY v. LOK BEE YEONG (AS ADMINISTRATOR OF THE ESTATE OF SOMA SUNDARAM DORAISWAMY, DECEASED)

HIGH COURT MALAYA, SHAH ALAM
CHAN JIT LI JC
B [CIVIL SUIT NO: 22NCVC-106-03-2015]
18 JUNE 2016

LAND LAW: *Power of Attorney – Validity of – Non-payment of loans – Deceased granted power of attorney to sell property (bungalow) and secure proceeds of sale as*
C *repayment of loans to plaintiff – Property subsequently sold by deceased – Proceeds from sale used to purchase another property (house) – Whether deceased committed fraud in selling bungalow – Whether power of attorney granted revocable – Whether s. 5 of Powers of Attorney Act 1949 must be complied to revoke power of attorney – Whether power of attorney could be impliedly revoked*

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The plaintiff was the elder brother of one Soma Sundaram ('the deceased') while the defendant was the deceased's widow being sued in her capacity as the administrator of the deceased's estate. The plaintiff contended that he had, during the deceased's lifetime, given the latter numerous loans. The loans, amongst others, consisted of RM40,000 to enable the deceased to start
E a pub; RM45,000 to assist the deceased to purchase a piece of property ('the bungalow'); and a loan of RM119,985 for the purpose of redeeming the bungalow from the bank which the deceased had promised to repay. It was because of the non-repayment of this loan that a power of attorney ('POA') was granted. Post execution of the POA, the plaintiff submitted that several
F other loans were given to the deceased. Two significant terms to be inserted in the POA would vest in the plaintiff the absolute power to sell the bungalow and that the whole of the sale proceeds would be given to him. However, the deceased collected the title of the bungalow from the Land Office and sold the bungalow for RM1.45 million. Instead of remitting the
G whole sum to the plaintiff, the deceased merely credited RM549,995 into the plaintiff's bank account. The balance of the sale proceeds was used, *inter alia*, to purchase a terrace house ('terrace house') at the price of RM300,000. It was the plaintiff's contention that the deceased's act of personally selling the bungalow and his subsequent failure to surrender the total sale proceeds to the plaintiff constituted a breach of trust and a commission of fraud as both
H the act and omission were against the expressed terms of the POA. The issues that arose for determination, *inter alia*, were (i) whether there was an irrevocable POA granted in favour of the plaintiff; (ii) whether there was a trust created in relation to the terrace house and the bungalow in favour of the plaintiff; and (iii) whether the deceased committed fraud against the
I plaintiff.

Held (allowing plaintiff's claim in part):

(1) A POA is a written delegation of powers to another to act as distinct from divesting oneself of title to one's property. A donor may choose to grant a revocable or irrevocable POA but should he desire to create an irrevocable POA, that desire should be expressly provided for within the deed itself. Based on the facts, the POA did not contain such an expressed term. As such *prima facie*, the POA was revocable in nature. For the plaintiff to succeed on his claim that it was an irrevocable POA, the plaintiff must not only show he gave consideration but that sufficient consideration was given. (paras 23, 24, 30)

(2) In determining whether or not sufficient consideration was given, the court concerned itself only with the pre-execution loans. Save for the redemption sum of RM119,985, the plaintiff's evidence of the numerous loans comprised of mere bare assertions. The plaintiff had fallen short of his duty of proof. Further, the consideration given did not commensurate with the sale proceeds of bungalow of RM1.45 million. Thus, although the plaintiff did give consideration, that consideration was insufficient to render the POA irrevocable. Hence, the deceased was within his right to revoke the POA which he in fact did by selling the bungalow and remitting the sale proceeds in the manner he deemed fit. As the act was well within his right, the deceased did not commit fraud. (paras 32 & 40-42)

(3) Although the deceased did not give a written notice of the revocation of the POA, the deceased had by his actions impliedly revoked the POA when the deceased exercised his power to sell and redistributed the sale proceeds. An implied revocation is recognised in law. There was, therefore, no subsisting valid POA even though s. 5 of the Powers of Attorney Act 1949 was not complied with. (paras 45-47)

(4) The plaintiff failed to establish that there was an intention on the part of the deceased to create a trust in favour of the plaintiff in respect of the bungalow. From the evidence, the deceased had merely intended to honour his debts to the plaintiff. The plaintiff's claim of a trust in respect of the bungalow must therefore fail. (paras 49 & 50)

(5) The terrace house was purchased in 2009 and the deceased passed away only in 2013. Although there was a four-year period, there was no attempt by the deceased to effect the transfer of the terrace house to the plaintiff if indeed that was his intention to create a trust. Therefore, what was before this court was only the plaintiff's personal bare assertion of the trust. (paras 54 & 55)

Case(s) referred to:

Derry v. Peek (1889) LR 14 App Cas 337 ***(refd)***
Malayan Banking Bhd v. Lim Tee Yong & Ors [1994] 4 CLJ 558 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

A *Three Rivers District Council & Ors v. Governor and Company of the Bank of England (No. 3) [2003] 2 AC 1* ***(refd)***
Wan Naimah v. Wan Mohamad Nawawai [1972] 1 LNS 164 FC ***(dist)***
Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd [1978] 1 LNS 244 FC ***(refd)***

B **Legislation referred to:**
Contracts Act 1950, s. 155
Evidence Act 1950, ss. 101, 102, 103, 114(g)
Powers Of Attorney Act 1949, s. 5

Other source(s) referred to:
C Berna Collier and Shannon Lindsay, *Powers of Attorney in Australia and New Zealand*, 1992, The Federation Press, pp 237-238
Halsbury's Laws of England, 9th edn, p 184

For the plaintiff - George Proctor; M/s YS Woo & Proctor
For the defendant - Jasvinder Singh; M/s Mazwan Pathma & Co

D *Reported by Sandra Gabriel*

JUDGMENT

Chan Jit Li JC:

E **[1]** The plaintiff is the elder brother of one Soma Sundaram a/l Doraisamy (deceased) while the defendant is the deceased's widow. She is being sued in her capacity as the administrator of the deceased's estate. Both the plaintiff and the defendant testified in court without calling any other witnesses.

F **[2]** The plaintiff's claim is based on breach of trust and fraud allegedly committed by the deceased. It revolves around a power of attorney granted by the deceased to the plaintiff. To appreciate the plaintiff's claim, it would be necessary to set out the brief facts leading to the grant of this power of attorney.

G **[3]** In his testimony in court the plaintiff (PW1) said that he had, during the deceased's lifetime, given the latter numerous loans. Some of the monies were used in relation to a piece of property known as No. 11, Jalan 6/6, 46000 Petaling Jaya, Selangor held in grant No. Pendaftaran 3208, Lot 152, Seksyen 6, Bandar Petaling Jaya, Daerah Kuala Lumpur. (hereinafter to be
H referred to as 'the bungalow'.) One such loan of RM120,000 was given for the purpose of redeeming the bungalow from the bank which the deceased had promised to repay within six months.

[4] This promise was not honoured. When the plaintiff made repeated requests for payment, the deceased suggested refinancing the bungalow so
I that the fresh funds could be utilised to settle all monies due to the plaintiff.

[5] Although the plaintiff agreed to the proposal, it did not materialise. Instead he received a call from the deceased informing him that, due to the latter's poor financial standing the deceased was unable to secure a loan. The deceased then made another proposal which involved the deceased making an outright transfer of the bungalow to the plaintiff. Again the plaintiff agreed.

[6] But this proposal also had to be aborted. The plaintiff was told by the deceased that in order for a direct transfer to be effected, he would have to be personally present to execute the legal documents. This was impossible as at that point of time the plaintiff was stationed in Tanzania as a serving colonel in the Malaysian Army. It was then that the deceased came up with a third proposal. Apparently the deceased's own solicitor had suggested the grant of a power of attorney to the plaintiff. Two significant terms to be inserted in this power of attorney will vest in the plaintiff the absolute power to sell the bungalow and that the whole of the sale proceeds would be given to him. The plaintiff agreed believing his interests to be fully secured as besides the power of attorney, the title to the bungalow would be surrendered to him. Thus, the power of attorney in question was created.

[7] Then, sometime in 2007, while the plaintiff was still in Tanzania the deceased phoned him from Malaysia suggesting extending the lease of the bungalow. The plaintiff thought it to be a good idea but as the bungalow was still registered in the deceased's name, he requested that the latter make the application. However, all costs incidental to the application was borne by the plaintiff. As the title was needed for the application, the deceased was asked to collect it from the plaintiff's wife who was residing in Malaysia.

[8] On his return to Malaysia, the plaintiff enquired and was told by the deceased that the title was still at the Land Office pending the lease extension application. He thought no more of it and left for Canada. When he returned from Canada, the deceased confessed to collect the title from the Land Office and then selling the bungalow for RM1.45 million. But instead of remitting the whole sum to the plaintiff, the deceased had merely credited RM549,995 into his bank account. The balance of the sale proceeds was used by the deceased to pay off his creditors and to purchase a terrace house. This house held under Grant No. HS(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling Jaya, Negeri Selangor having a postal address at No. 15, Jalan PJS 914, Bandar Sunway, 46150 Petaling Jaya, Selangor ('terrace house') was purchased from the defendant's sister at the price of RM300,000.

[9] It is the plaintiff's contention that the deceased's very act of personally selling the bungalow and subsequent failure to surrender the total sale proceeds to him constitute a breach of trust and a commission of fraud as both the act and omission are against the expressed terms of the power of attorney. Thus, he seeks the following reliefs:

A (1) An order and declaration that the said SOMA SUNDARAM A/L DORAISWAMY (Deceased) had assigned his interest in the said property held under No. Pendaftaran 3208, Lot 152, Seksyen 6, Bandar Petaling Jaya, Daerah Kuala Lumpur, having a postal address No. 11, Jalan 6/6, 46000 Petaling Jaya, Selangor to the Plaintiff *vide* a Power of Attorney dated 2.1.2004 and the Plaintiff
B was entitled absolutely under Clause 21 of the said Power Attorney to the said property and/or to all proceeds from the sale of the said property.

(2) An order and declaration that the Defendant pays the Plaintiff the sum of RM900,005.00 being the balance proceeds received by the
C said SOMA SUNDARAM A/L DORAISWAMY (Deceased) from the sale of the said property.

(3) Further an order and declaration that upon the sale of the said Property held under HS(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor having a postal
D address at No. 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya, the sum of RM900,005.00 under Para 57(2) above be deducted and paid to the Plaintiff together with the further sum RM141,936.30 stated at Para 54 (of the statement of claim.)

(4) Further an order and declaration that the Plaintiff be authorised to execute the Sale & Purchase Agreement and Memorandum of
E Transfer and all other requisite documents for the sale of the property held under H.S.(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No. 15, Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya to the Intended Purchaser Teng Chuan Heng and/or any other Intended Purchaser at a Purchase Price of RM790,000.00 or above
F (if possible).

(5) An order and declaration that the Plaintiff be authorised to receive and retain the sum of RM1,041,947.30 from the sale of the land held under H.S.(M) 8507 PT 1458, Mukim Damansara, Bandar Sunway, Daerah Petaling, Negeri Selangor having a postal address at No. 15,
G Jalan PJS 914, Bandar Sunway, 46150, Petaling Jaya from the Intended Purchaser Teng Chuan Heng and/or any other Intended Purchaser in settlement of the monies owing by the deceased to the Plaintiff.

(6) Costs to be paid to the Plaintiff by the Defendant.

H **[10]** The defendant admits having no knowledge of the power of attorney but she attacks the veracity of the plaintiff's claim. She contends that if the plaintiff's allegations were true, the plaintiff ought to have instituted the action during the deceased's lifetime when the deceased was able to contest the claim instead of timing it to after his demise.

I **[11]** On the other end of the spectrum, the plaintiff argues that the defendant is in no position to challenge his claim on two grounds. Firstly, the challenge to the power of attorney was not pleaded in her statement of

defence and secondly, she does not have personal knowledge of both the power of attorney and the trust. The power of attorney was executed before her marriage and she was not present when the deceased voiced his intention to transfer the terrace house to the plaintiff.

[12] This bane of contention ought to be addressed first as it impacts the evaluation of evidence.

[13] The Federal Court case of *Yong Nyee Fan & Sons Sdn Bhd v. Kim Guan & Co Sdn Bhd* [1978] 1 LNS 244; [1979] 1 MLJ 182 provides guidance as to the evaluation of a person's evidence made against a deceased person. Hashim Yeop A Sani J (as he then was) in delivering the judgment of the Federal Court said (at p. 192):

> So at the trial it became, as Yap admitted under cross-examination, a matter between the word of two living persons and a dead man who could not now speak for himself. *But there is no rule of law that a claim against a dead person cannot be entertained or that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim by a living person against the estate of a deceased person*. (emphasis added)

[14] His Lordship then goes on to say how the courts should approach such evidence:

> A slightly earlier case is *In re Garnett* where Brett M.R said at pp. 8-9:
>
> > Another point was taken. It was said that this release cannot be questioned because the person to whom it was given is dead, and also that it cannot be questioned unless those who object and state certain facts are corroborated, and it is said that was a doctrine of the Court of Chancery. I do not assent to this argument; there is no such law. Are we to be told that a person whom everybody on earth would believe, who is produce as a witness before the judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him whose evidence the judge, in fact, believes to be absolutely true, is, according to a doctrine of the Courts of Equity, not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind to be adopter either in Law or in Equity.
>
> **These authorities establish that though the case for the claimants of a trust against a dead man needs no corroboration, it must be approached with suspicion**. (emphasis added)

[15] I am with the plaintiff on both scores in his challenge of the defendant's capacity to testify against him. Parties are bound by their pleadings and it is the most basic tenet of the law of evidence that he who testifies must have personal knowledge of what he says. But this does not mean that the plaintiff is home free. Sections 101 to 103 of the Evidence Act 1950 requires the plaintiff to prove his case before the defendant is asked to reply.

[16] In this judgment I propose to deal with the following issues:

(i) was there a fraud committed by the deceased?

(ii) was there a breach of trust by the deceased?

(i) Was There A Fraud Committed By The Deceased?

[17] Fraud is a tort of deceit. To establish fraud, it is essential for the plaintiff to show the element of dishonesty and mere negligence on the part of the defendant is insufficient: see *Derry v. Peek* [1889] LR 14 App Cas 337, *Malayan Banking Bhd v. Lim Tee Yong & Ors* [1994] 4 CLJ 558, *Three Rivers District Council & Ors v. Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1.

[18] Although previously a plaintiff is required to shoulder the burden of proving the fraud beyond reasonable doubt, with the Federal Court's decision of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 it suffices if he adduces evidence on a balance of probabilities.

[19] I am of the view that in order to determine whether or not the deceased committed fraud it is incumbent on me to first determine whether it was within the deceased's powers to revoke his grant of the power of attorney for if the deceased had the powers, he cannot be said to have committed fraud and breach of trust when he personally sold the bungalow and remitted part and not the whole sale proceeds to the plaintiff.

[20] Mr George Proctor, learned counsel for the plaintiff, also maintains that there has always been a valid subsisting power of attorney for two reasons. Firstly, the power of attorney is irrevocable by virtue of the fact that the grant of the power of attorney was as a consequence of the plaintiff giving consideration for it. Secondly, there was non-compliance of s. 5 of the Powers of Attorney Act 1949.

[21] I will deal with these arguments by addressing the following issues:

(a) Was it within the deceased's powers to revoke his grant of the power of attorney?

(b) Must there be compliance of s. 5 of the Powers of Attorney Act 1949 in order to revoke a power of attorney? Or can there be an implied revocation of the power of attorney by the conduct of the donor?

(a) Was It Within The Deceased's Powers To Revoke His Grant Of The Power Of Attorney?

[22] *Halsbury's Laws of England* (4th edn. Reissue) at para. 627 states:

> A power of attorney is a formal instrument by which one person, the donor of the power, confers on another, the donee, power to act on behalf of the donor in the performance of a specific act or classes of act or generally. By such a creation, the donor as principal shall be liable to a third party for the acts of the donee, his agent, if the donee has acted within the bounds of his authority or such acts of the donee being subsequently rectifies by the donor. The law applicable under these circumstances between the donor and the donee is therefore that of principal and agent. (*Halsbury Laws of England* (4th Reissue) at para 86).

[23] In short, a power of attorney is a written delegation of powers to another to act as distinct from divesting oneself of title to one's property. A donor may choose to grant a revocable or irrevocable power of attorney but should he desire to create an irrevocable power of attorney, that desire should be expressly provided for within the deed itself.

[24] It is obvious that this power of attorney does not contain such an expressed term. As such *prima facie*, this power of attorney is revocable in nature.

[25] However, Mr George argues that notwithstanding the absence of the declaration, this power of attorney is irrevocable by virtue of s. 155 of the Contracts Act 1950 which reads as follows:

> s. 155 Termination of agency, where agent has an interest in subject-matter.
>
> Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
>
> ILLUSTRATIONS.
>
> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his unsoundness of mind or death. ...

[26] It is his contention that the plaintiff's case is on all fours with illustration (a). The deceased was in the plaintiff's debt as he was unable to repay the numerous loans given by the latter. Hence, the power of attorney was created to vest in the plaintiff the power to sell and then to compensate himself (the plaintiff) with the sale proceeds.

[27] This, he submits, is clearly reflected in the wordings of cls. 9 and 21 which appears as follows:

A (9) To sell to any person the said Property and for that purpose to sign and execute all transfers and other instruments necessary or land registry documents.

...

(21) All proceeds from the sale of the said Property shall go to my
B Attorney absolutely.

[28] Thus, the deceased's act of personally selling the bungalow without the consent or knowledge of the plaintiff and his failure to remit the whole of the sale proceeds to the plaintiff blatantly runs contrary to the terms of the power of attorney.

C

[29] Mr George's argument at first sight appears to be consistent with the common law position described by the learned authors (Berna Collier and Shannon Lindsay) of '*Powers of Attorney in Australia and New Zealand*' (1992 The Federation Press) at pp. 237 and 238 as follows:

D The principle that an authority coupled with an interest is irrevocable except with the donee's consent has been recognised for centuries. A good definition of an irrevocable power coupled with an interest may be found in the case of *CLERK v. LAURIE* [1857] 2 H&N199; 157 ER 83:

> What is meant by an authority coupled with an interest being
E irrevocable is this - that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable.

Accordingly for a power to be irrevocable at common law, two criteria must be satisfied:
F

a. The power must be given for sufficient consideration or be created by deed, and

b. The power must be given for the purpose of securing some benefit to the donee.

G **[30]** It would appear, from a reading of the above, that in order for the plaintiff to succeed on his claim that it was an irrevocable power of attorney the plaintiff must not only shows he gave consideration but that sufficient consideration was given. 'Consideration' according to *Halsbury's Laws of England* (9th edn.) at p. 184 is:

H Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promise does some act from which a third person
I benefits, and which he would not have done but for the promise.

[31] As submitted by Mr George, the numerous loans given by the plaintiff to the deceased both pre and post execution of the power of attorney constituted the required consideration.

[32] I am of the view that in determining whether or not sufficient consideration was given, this court should concern itself only with the pre execution loans. This is because there is no evidence to show that, at the time the power of attorney was executed, the plaintiff and the deceased agreed to some future consideration. However, for the purpose of completeness I shall deal with both periods.

Pre Execution Of The Power Of Attorney

[33] According to the plaintiff, the first loan of RM40,000 was to enable the deceased to start a pub at Damansara Utama. However, he admitted that he has no proof of this loan and due to the passage of time neither can he remember the exact amount given. The sum of RM45,000 was only an estimate. Due to the plaintiff's own doubts, I find the existence of this loan unproven.

[34] The second loan relates to the purchase of the bungalow. According to the plaintiff the bungalow was purchased from one Tunku Meriam for RM195,000. It was agreed between the deceased and the said Tunku Meriam that RM45,000 would be paid in cash and the balance by way of a bank loan. The plaintiff alleges that the deceased had borrowed this RM45,000 from him and as evidence thereof he produced a receipt from the solicitor firm of Messrs N Saraswathy Devi.

[35] I have perused this receipt (p. 23 of bundle 'B') but I find that in no way does it support the plaintiff's claim. Firstly, the sum written on the receipt is for RM28,400 and not RM45,000. Secondly, the said receipt is issued in the name of the deceased and not in the name of the plaintiff. As such I also find this loan unproven.

[36] To move along, the plaintiff said the deceased successfully secured a loan from Mayban Finance for RM150,000 with the plaintiff as the guarantor. (A letter issued by Messrs Hisham, Chong & Co at p. 20 of bundle 'B' attests to this.) Sometime in mid-2003 when he was still in Tanzania, the deceased phoned him seeking a loan to clear the arrears of bank instalments which the latter had defaulted paying. The deceased also informed the plaintiff that a notice of intention to auction the bungalow had been issued. Fearing that legal action would also be taken against him in his capacity as guarantor, the plaintiff suggested a total redemption of the bungalow. To corroborate his oral testimony, the plaintiff produced a Mayban Finance Redemption Statement for the sum of RM119,985 and his cheque issued for the same amount. This took place sometime in July 2013 and it was because of the non-repayment of this loan that the power of attorney was granted.

Post Execution Of The Power Of Attorney

[37] Around this time, the pub at Damansara Utama was shut down and the deceased returned to the family home at Tapah where he managed his father's oil palm holdings until the father's demise. On the plaintiff's return

to Malaysia in 2007, the deceased requested for another loan of RM50,000 to open another pub, this time at Ara Damansara. Again, apart from his oral claim, the plaintiff has no proof of this loan.

[38] The plaintiff also alleges that when he discovered that the lease to the bungalow was due to expire on 12 September 2026, he instructed the deceased to apply for an extension. The extension was approved subject to a payment of RM230,515 to the Land Office. The plaintiff explains that he paid for the lease extension by issuing a cheque of RM180,000 to his son, Shonin Sidambaram, who in turn topped up the balance of RM15,776.32 to purchase a HSBC cashier's order for RM195,475.32. Although the cashier's order was for a sum lesser than RM230,515 it was in effect a full settlement of the lease extension as the Land Office had offered a 30% discount for early payment. However, although the plaintiff claims that this cashier's order was given to the deceased for further action, there is no evidence to show who handed this cashier's order to the deceased. This payment took place sometime in 2007.

[39] He produces a copy of the cheque that he issued in favour of Shonin Sidambaram for RM180,000. This cheque by itself merely shows that Shonin Sidambaram received a payment of RM180,000 from the plaintiff and nothing more. Shonin Sidambaram is an obvious material witness who could have corroborated the plaintiff's testimony. But he was not called and neither was his absence explained. To my mind this is an instance where s. 114(g) of the Evidence Act 1950 can and ought to be invoked against the plaintiff. It is also pertinent to note here that the person alleged to have handed the cashier's order to the deceased has not been identified.

[40] Upon an evaluation of the plaintiff's case I find that, save for the redemption sum of RM119,985 (para. 29), the plaintiff's evidence of the numerous loans comprised of mere bare assertions by him. Bearing in mind *Yong Nyee Fan & Sons Sdn Bhd* on the cautious approach to be adopted, I find that the plaintiff has fallen short of his duty of proof; the defendant therefore need not answer.

[41] This takes me to the loan of RM119,985 which I find has been proven. I am of the view that the consideration given does not commensurate with the sale proceeds of bungalow of RM1.45 million. My stand is fortified by a reading of the 'powers of attorney in Australia and New Zealand' reproduced at para. 23 above. Thus, although the plaintiff did give consideration that consideration was insufficient to render the Power of Attorney irrevocable.

[42] The deceased was therefore within his right to revoke the power of attorney which he in fact did by selling the bungalow and remitting the sale proceeds in the manner he deemed fit. As the act was well within his right, it is my finding that the deceased did not commit fraud.

(b) Must There Be Compliance Of s. 5 Of The Powers Of Attorney Act 1949 In Order To Revoke A Power Of Attorney? Or Can There Be An Implied Revocation Of The Power Of Attorney By The Conduct Of The Donor?

[43] Section 5 on which Mr George's argument is founded reads as follows:

> **Revocation**.
>
> (5) Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instruments is valid and so far as may be compatible with the terms of the instrument, *continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited*, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy. (emphasis added)

[44] He submits that a renunciation or revocation is only effective upon compliance of s. 5 which mandates the lodging of a written renunciation or revocation at the Registry where the power of attorney was registered. As the deceased had not lodged this written renunciation or revocation, the power of attorney is still subsisting and binding.

[45] I find this submission to be untenable. In the first place, there was no written revocation. As such, it would be impossible for s. 5 to be complied with. I am also of the view that this provision exist to protect third parties who may have acted on a revoked power of attorney. In such an instance, a donor who fails to register the revocation must make good any loss suffered by the said third party.

[46] Although the deceased did not give a written notice of the revocation of the power of attorney, the deceased had by his actions impliedly revoked the power of attorney. And, implied revocation is recognised in law. The following excerpt from '*Powers of Attorney*' *supra* is relevant:

> If the donor of a power of attorney does an act which is incompatible with the continued operation of the power, it is revoked. An example of implied revocation is provided by a shareholder who appoints a proxy for attending a particular meeting. He revokes the instrument of proxy by attending in person and voting. ... An attorney who comes to hear of an act on the donor's part that might be construed as an implied revocation should immediately ask the donor for clarification of the position.

[47] Similarly, in the instant case, the implied revocation came into play when the plaintiff exercised his power to sell and redistributed the sale proceeds. There is, therefore, no subsisting valid power of attorney even though s. 5 was not complied with.

(ii) Was There A Breach Of Trust By The Deceased?

[48] In order to deal with this issue, it is incumbent upon me to deal with the issue whether there is sufficient evidence to show that a trust was created in the plaintiff's favour in respect of both the bungalow and the terrace house.

The Bungalow

[49] I am of the view that the plaintiff has failed to establish that there was an intention on the part of the deceased to create a trust in favour of the plaintiff in respect of the bungalow. From the evidence, the deceased had merely intended to honour his debts to the plaintiff as the plaintiff had in examination-in-chief stated:

> Q.23. Did your brother then pay you back the RM100,000 in six (6) months' time as promised by him?
>
> A. No. In December 2003 I telephoned him from Tanzania and enquired whether he could settle the RM100,000 as promised but he informed me that he had a lot of creditors who were pressing him for immediate payment and whether I could give him more time.
>
> Q.24. Did you agree to give him more time?
>
> A. I suddenly got worried as I thought his business was expanding. I told him it was not fair as the money was paid in good faith and was a substantial sum. Further I told him that my family members were complaining that i was spoiling him and he was taking advantage of me.
>
> Q.25. What was his reply?
>
> A. He then told me that he will try to refinance his bungalow and pay me the full sum lent by me to him.

[50] The plaintiff's claim of a trust in respect of the bungalow must therefore fail.

The Terrace House

[51] The plaintiff explains the trust creation of the terrace house in the following manner. He was furious when the deceased informed him of the sale of the bungalow and the non-remittance of the total sale proceeds. To pacify him, the deceased promised to transfer the terrace house to his name upon receipt of the title. However, before this could be done, the deceased suffered a stroke in 2010. He underwent treatment both locally and in India where he subsequently died on 13 August 2014.

(This terrace house is now the subject of an agreement to purchase dated 25 June 2014 entered into between the deceased and a third party.)

[52] In urging the court to recognise this trust despite the absence of a formal instrument of trust, Mr George refers to the Federal Court's decision in *Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41. The plaintiff in that case had sued his sister, the registered proprietress of an immoveable property, for an undivided half share of the same which he claimed was held on trust for him. The property in question had been purchased by their late father but registered in the defendant's name as the plaintiff was then a minor. The plaintiff's claim was allowed despite the fact that no formal trust instrument was created.

[53] I have no quarrels with that statement of law. But *Wan Naimah*'s case is factually distinguishable from the instant case. In that case, the Federal Court found ample proof of a trust. Apart from the plaintiff's own testimony, there were other independent sources of evidence supporting the plaintiff's claim. One Wan Yaacob identified as the deceased's cousin and therefore the parties' uncle had testified that he was with the deceased when the deceased negotiated for the purchase of the property. Even at that point in time, the deceased had told him that half share was to be given to the plaintiff. The deceased then made good his intention by causing to be executed a document which was given to Wan Yaacob for safe keeping. This document contained a declaration by the defendant that she will transfer half share of the property to the plaintiff without any consideration of payment. The defendant was made to sign this document together with the plaintiff and two other witnesses. The same two witnesses also testified in favour of the plaintiff who told the court that before his death, the deceased had instructed him to seek Wan Yaacob out in the event that the defendant refused to transfer the property as the document was in Wan Yaacob's custody. In short, there was overwhelming evidence to show both (the deceased's) intention and action of creating the trust.

[54] However, what is before this court is only the plaintiff's personal bare assertion of the trust. He further claimed that the deceased had also voiced his intention of making a grant of a power of attorney in his favour in respect of the terrace house. In support of his oral testimony, he produced the title to the terrace house which he explained was in his possession because it was given to him.

[55] I noted that this house was purchased in 2009 and the deceased passed away only in 2013. Although there was a four year period there was no attempt by the deceased to effect the transfer of the house to the plaintiff if indeed that was his intention. There was also no evidence of any attempts by the deceased to create the power of attorney the plaintiff spoke of. When he was asked by Mr Jasvinder Singh, learned counsel for the defendant, why this was so, the plaintiff offered two reasons. The first reason was that the deceased was then staying in Tapah and the other reason was that after suffering two stroke attacks the deceased was unable to effect the transfer.

[56] I remain unconvinced by both explanations. There was no evidence led to show whether or not there is a legal firm in Tapah but be that as it may, as the plaintiff had volunteered, Tapah is a mere two hour drive from Kuala Lumpur. This drive should not constitute an obstacle for the deceased if it was true that he had the intent to transfer the house to the plaintiff as this was a matter of great import.

[57] I also find the deceased physical incapacity an enigma as it begs the question why was he unable to execute a transfer of the house to the plaintiff but was able to execute the agreement to purchase of 25 June 2014?

[58] The only logical conclusion to be inferred from the deceased's lackadaisical attitude in transferring the terrace house is simply this; he simply did not have the intent to transfer the terrace house to the plaintiff.

[59] As to the non-execution of a power of attorney, the plaintiff himself provided the answer. Under cross-examination by the learned counsel for the defendant, he said:

> Q: Mr. Sidambaram, I am putting to you that the deceased never intended to prepare a second Power of Attorney in your favour for the terrace house. Do you agree or disagree?
>
> A: Sorry, come again.
>
> Q: I am putting to you that that the deceased never intended to prepare a second Power of Attorney in your favour for the terrace house.
>
> A: I never ... how do I say that. You are saying that he never intended to prepare the PA?
>
> Q: Yes.
>
> A: Maybe, yes.

[60] In re-examination, the plaintiff proffered the explanation that he had answered as such as he was confused. This is not a convincing explanation. In the first place, it was a very simple question and secondly, the question was put to him twice and his affirmative answer came only after he ascertained from Mr Jasvinder the meaning of the question.

[61] I am also unable to accept that the plaintiff's physical possession of the title to the terrace house is evidence of the trust. At most, it merely goes to show that the plaintiff had access to the deceased's personal belongings as evidenced by the fact that the plaintiff was able to produce two very intimate letters written by the defendant to the deceased in respect of their impending divorce.

[62] Thus, on the facts before me I find that the plaintiff has also failed to show the existence of a trust in respect of the terrace house in his favour.

[63] I now turn to the plaintiff's claim as tabulated in para. 54 of the statement of claim. It appears as follows:

Particular of Expenses

No.	Particulars	Amount (RM)
1.	Medical bills.	Withdrawn
2.	Medical bills.	Withdrawn
3.	Medical bills.	Withdrawn
4.	Medical bills.	Withdrawn
5.	Payment by Plaintiff on behalf of Deceased between 30-4-2014 to Lembaga Hasil Dalam Negeri Shah Alam	14,950.43
6.	Payment by Plaintiff on behalf of Deceased for Trip to India for Ayurvedic / Medical Treatment on 14/7/2014 as follows: a) Air ticket KL to Trichy and Return, India for 3 persons for RM1,574.30 b) Transportation / Travel Expenses in Trichy @ RM1,000.00 c) Physiotherapist amounting to RM1,000.00 d) Minor Medical Expenses in India @ RM500.00 e) Paid Logama RM3,000.00 as petty cash to give Deceased whilst undergoing treatment.	7,047.30
7.	Going on 16-8-2014 to India to make all funeral arrangements and to purchase return air tickets from KL to Trichy and back for 4 persons.	6,700.00
8.	Payment to Suriya Sidda Clinic, Trichy/Ayurvedic Treatment for Deceased.	3,513.00
9.	Payment to VKS Tours & Travel, Trichy for Transportation.	4,675.67
10.	Payment to Susaimanickam for Ambulance, Coffin, Funeral undertakers.	12,493.22
11.	Payment to Seenu Home Care Expenses for Deceased on 14-7-2014 to 12-8-2014	2,432.43
12.	Transportation of Deceased Body from KLIA to Tapah/ Funeral Expenses	13,261.40
13.	Claim for reimbursement incurred by Plaintiff and Deceased's younger sister Logama who took turns from 2011-2014 to fetch and send back	

	deceased from his home in Bandar Utama to one of the Various Medical Clinics/Hospitals/ Ayurverdic/Massage Centre at 3 times a week to the following centres namely at RM600.00 a month approximately: a) University Hospital PJ b) KPJ Damansara Specialist Centre c) Nasam Stroke Centre PJ d) Clinic Genga PJ e) MAHSA Physiotherapy Centre, Jalan University f) Yayasan Kebajikan SSL Puchong g) Ayurvedic Massage Centre Puchong h) Ayurvedic Centre in Seremban, Negeri Sembilan in 2013 i) Medical Clinic Gurun and Chang Lun, Kedah in 2012 (2 trips)	28,000.00
	Grand Total	141,936.00

[64] I note that although the plaintiff has not identified the cause of action on which these items of claim are premised, learned counsel makes no objection to this omission. Instead the defendant is only challenging the items and amount claimed. However, the plaintiff withdrew all items in relation to the deceased's medical expenses before the commencement of the trial.

[65] I allowed only two items. The first item is the payment of RM14,950.43 to the Inland Revenue Department to enable the deceased to travel to India for medical treatment as the defendant concedes on this debt. The other item which I have allowed is the funeral expenses which the plaintiff paid for. The amount is limited to the receipts produced and issued in the plaintiff's name instead of the RM42,136.92 which the plaintiff seeks. My reason for the order is because the cash receipts do not show that it is the plaintiff who made the payments. As the other receipts bear the name of Logama Doraisamy, any payment if due, is due only to Logama Doraisamy.

[66] The plaintiff further alleges in his oral testimony that he had paid for Logama's expenses to India to bring the deceased's body back. For this he sought to rely on the following 'IOU':

IOU

I, SIDAMBARAM A/L TOROSAMY (NRI No. 460913-08-5473) hereby acknowledge and agree to pay you LOGAMA A/P DORAISAMY (Nric No. 581119-08-5952) the sum of RM36,861.62 (Thirty Six Thousand Eight Hundred Sixty One and Cents Sixty Two Only) as reimbursement for

expenses incurred by you in taking out Brother (Soma Sundaram a/l Doraiswamy (Nric 540925-06-5015)) to Trichy, India on 14th July 2015 for AYURVEDIC treatment and later on 14th August 2015 to make the necessary administrative / medical documentation, logistic arrangements and pay the expenses to bring back to Malaysia the body of our Brother (Soma Sundaram a/l Doraiswamy) who passed away on 13th August 2014 in Trichy, India while receiving treatment.

I will pay you the sum of RM36,861.62 only after the outcome of my claim filed in High Court, Shah Alam against the Estate of our Brother SOMA SUNDARAM A/L DORAISWAMY (22NCVC-106-03/2015).

Dated 7th March 2015

signature

.....

Sidambaram a/l Torosamy

Nric No. 460913-08-5473

[67] I find the plaintiff's documentary evidence contradicts his oral testimony. Although he said he had paid for the expenses, the wordings contained in the IOU shows that it is a conditional debt which the plaintiff's liability is dependent on the outcome of this case.

[68] I also view the document with suspect. The document is dated 7 March 2015. This means that it was only created after the filing of the writ ie 4 March. The IOU also contains material inaccuracies as regards the dates of Logama's trips. Her trips were said to have been made in 2015 when in fact the deceased passed away in 2014. The only signature that appears on it is that of the plaintiff's. There is nothing on the IOU to show that Logama is privy to the document and neither was Logama called as a witness. It is obviously a self-made and self-serving document and it would be unsafe to rely on it.

[69] Thus, this item of claim cannot be allowed.

[70] His claim for the quit rent and assessment which he alleges that he had paid is dismissed as it was not pleaded.

[71] The plaintiff's claim, save for the two items mentioned in para. 65, is dismissed. By consent, the parties agreed that each party shall bear their respective costs.